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GENERALI INSURANCE MALAYSIA BHD & ANOR v. DURA GUARD FORCE & CONSULTANCY SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
GAN TECHIONG JC
[CIVIL SUIT NO: WA-23NCVC-39-07-2023]
16 FEBRUARY 2024

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Abstract – *The existence of a subrogation clause in a contract between an insurer and an insured does not magically override the doctrine of privity of contract because there is no statutory force behind a subrogation clause, which is just a contractual clause that does not involve the third party who is to be sued. An absolute assignment of a chose in action, which is 'effectual in law' by virtue of s. 4(3) of the Civil Law Act 1956, is mandatory to cross the hurdle of privity of contract if the insurer wants to use its own name to sue the third party because an absolute assignment has statutory force which a subrogation clause lacks.*

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INSURANCE: *Policy – Clauses – Subrogation clause – Insured signed discharge and subrogation form – Insurer subrogated with insured's rights to recover from any party liable for loss or damage that gave rise to insurance claim – Insurer and insured commenced action premised on tort against other party for breach of duty – Insurer used own name in action – Whether subrogation clause in insurance contract gives insurer right to use own name to sue other party – Whether absolute assignment necessary to clothe insurer with right to sue in own name – Civil Law Act 1956, s. 4(3)*

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CONTRACT: *Insurance – Privity – Insured signed discharge and subrogation form – Insurer subrogated with insured's rights to recover from any party liable for loss or damage that gave rise to insurance claim – Insurer and insured commenced action premised on tort against other party for breach of duty – Whether there was privity of contract between insurer and other party – Whether insurer had locus standi*

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CIVIL PROCEDURE: *Striking out – Application for – Insured signed discharge and subrogation form – Insurer subrogated with insured's rights to recover from any party liable for loss or damage that gave rise to insurance claim – Insurer and insured commenced action premised on tort against other party for breach of duty – Application by other party to strike out insurer's claim – Whether insurer had right to use own name to sue other party – Whether insurer had cause of action – Rules of Court 2012, O. 18 r. 19(1)(a), (b) & (d)*

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The first plaintiff was an insurance company/insurer that entered into an insurance contract with the second plaintiff to cover the latter against various risks at a construction site where it was engaged as the building contractor. The second plaintiff, in turn, entered into a contract with the defendant, a

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security company. When a theft of electrical and fibre optic cables, which was a risk covered by the insurance contract, occurred at the project site, the second plaintiff was paid the compensation of RM1,314,361.52 under the insurance policy. The second plaintiff signed a discharge and subrogation form to confirm: (i) acceptance of the first plaintiff's offer to pay RM1,314,361.52 as full and final settlement of the second plaintiff's claim under the insurance contract; and (ii) that the first plaintiff was subrogated with the second plaintiff's rights to recover from any party liable for the loss or damage that gave rise to the insurance claim. The plaintiffs commenced an action premised on tort against the defendant for breach of duty. The defendant applied to strike out the first plaintiff's claim, pursuant to O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012, on the ground that the first plaintiff had no right to use its own name to sue the defendant as it had no cause of action. The issues that arose for determination were: (i) does a subrogation clause in an insurance contract give an insurer the right to use its own name to sue the other party; and (ii) is an absolute assignment necessary to clothe the insurer with a right to sue in its own name.

Held (allowing defendant's application to strike out first plaintiff's action; ordering second plaintiff's claim to proceed to trial):

(1) A subrogation clause alone is insufficient to clothe an insurer with the right to use its own name to sue a party who breached a contract with the insured or who committed a tort that caused the insured to suffer a loss. A party who enters into a contract with an insured party does not owe any duty of care to the other party's insurer. It would impose an intolerable burden upon those who enter into contracts with an insured party if they are to be held to owe a duty of care to the other party's insurer. The first plaintiff attempted to claim its own loss, *ie*, the adjuster's fees, but did not even plead what cause of action that it allegedly had, as the insurer, against the defendant. If the first plaintiff was to plead that the defendant owed the first plaintiff a duty of care, it was a plea that would be unsustainable in law. (paras 18 & 31)

(2) An absolute assignment is mandatory for an insurer to cross the hurdle of privity of contract if it wants to use its own name to sue a tortfeasor or a party who had breached a contract with the insured, as the case may be, because an absolute assignment has statutory force which a subrogation clause lacks. The statutory force to empower absolute assignments to override the doctrine of privity of contract is found in s. 4(3) of the Civil Law Act 1956 ('Act'). If the words relevant to 'chose in action' in an absolute assignment are extracted from s. 4(3) and applied in the context of an insured/assignor and an insurer/assignee, it would clearly mean that an absolute assignment in writing, under the hand of the assignor/insurer, of any legal chose in action (the right to

A sue the wrongdoer) of which express notice in writing has been given to the other party (the wrongdoer) against whom the assignor/insured had a chose in action, shall be deemed to have been effectual in law to pass and transfer the legal right to the chose in action to the assignee/insurer and all legal and other remedies for the same from the date of the notice. The final part of s. 4(3) is crystal-clear in Parliament's intention to give statutory force to an absolute assignment to override the doctrine of privity of contract, in that the assent of the other party (who breached the contract or a tortfeasor), giving rise to the chose in action (right to sue) is not required. All that is required is for notice of the deed of assignment to be given to that party for the absolute assignment to be effectual in law to pass and transfer the legal right to the chose in action to the assignee (which would include an insurer that is an assignee under an absolute deed of assignment), from the date of the notice. When an absolute assignment is 'effectual in law', as worded in s. 4(3), it works to create privity of contract between the assignee and the other party who contracted with the assignor. In essence, the assignor ceases to have the chose in action because he has transferred it to the assignee and is legally substituted with the assignee, who can then use its own name to sue the other party. However, s. 4(3) only makes absolute assignments of rights to collect debts and chose in action effectual in law without the concurrence of the debtor or the person against whom the assignor has a chose in action. It does not enable the assignment of liabilities without the concurrence of a creditor. (paras 32-33 & 36-38)

(3) Unless there is an absolute assignment of the insured's chose in action (with due notice given), that is 'effectual in law' by virtue of s. 4(3) of the Act, an insurer has no *locus standi* to appear in the civil suit as a plaintiff. Since the first plaintiff was not an absolute assignee of the second plaintiff's contractual rights and chose in action against the defendant, the first plaintiff should have used only the second plaintiff's name to sue the defendant. The first plaintiff's action against the defendant in this civil suit was obviously unsustainable. (para 42)

Case(s) referred to:

Allianz General Insurance Company (Malaysia) Bhd & Anor v. Fuji Logistics (M) Sdn Bhd & Anor [2021] CLJU 1913; [2021] 1 LNS 1913 HC ***(not foll)***

Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***

Damai Freight (M) Sdn Bhd v. Affin Bank Bhd [2015] 4 CLJ 1 FC ***(refd)***

Glomac Alliance Sdn Bhd v. Nordin Md Zain [2023] 3 CLJ 485 CA ***(refd)***

Kementerian Pertahanan Malaysia & Anor v. Malaysian International Shipping Corporation Bhd & Ors [2007] 4 CLJ 820 CA ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Sabah Development Bank Bhd v. Petron Oil (M) Sdn Bhd [2020] 4 CLJ 811 FC ***(refd)***

Suwiri Sdn Bhd v. Government Of The State Of Sabah [2008] 1 CLJ 123 FC ***(refd)***

Teo Kim Kien & Ors v. Lai Sen & Anor [1980] CLJU 80; [1980] 1 LNS 80 FC ***(refd)*** A
The Co-Operative Central Bank Ltd v. KGV & Associates Sdn Bhd [2008] 2 CLJ 545 FC ***(refd)***
Tiong Nam Trading & Transport (M) Sdn Bhd v. Commercial Union Assurance (Malaysia) Sdn Bhd [2008] 6 CLJ 160 CA ***(refd)***

Legislation referred to: B
Civil Law Act 1956, s. 4(3)
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d)

For the plaintiffs - Danaashini Thiruselvam; M/s Law Chambers Of Vin Sa & Ian
For the defendant - Lee Guo Wen; M/s Gan, Ho & Razlan Hadri

Reported by Najib Tamby C

JUDGMENT

Gan Techiong JC:

Introduction

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[1] Is a subrogation clause in an insurance contract sufficient to empower an insurance company (the insurer), using its own name, to sue a party who had contracted with the insured, for breach of contract or to sue a tortfeasor who caused the insured to suffer a loss? It is trite that a subrogation clause in an insurance contract gives the insurer a right to compel the insured to sue a tortfeasor or the party who breached a contract with the insured, as the case may be, and for the insurer to receive the damages recovered. However, does a subrogation clause in an insurance contract give an insurer a right to use its own name to sue the other party? Is an absolute assignment necessary to clothe the insurer with a right to sue in its own name? These two questions of law arose because there is no privity of contract between an insurer and the party who breached a contract with the insured, and if the insured has suffered a loss allegedly due to the negligence of a third party, the tortfeasor will plead that he does not owe the insurer any duty of care.

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[2] In this case, the aforesaid questions of law arose in the defendant's application to strike out the first plaintiff's claim under O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012. The answers to those two questions of law would determine whether the first plaintiff's claim was obviously unsustainable.

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[3] After hearing and reserving the decision to consider those questions of law thoroughly, I decided to allow the defendant's application to strike out the first plaintiff's claim. After reading all the authorities, I formed the view that a subrogation clause in an insurance contract does not give an insurer (the first plaintiff herein) a right to use its own name to sue a third party (the defendant), and that an absolute assignment of the insured's chose in action is necessary to clothe the insurer with a right to sue in its own name. My reasons are as stated below.

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A **The Undisputed Facts**

[4] The first plaintiff is an insurance company/insurer that entered into an insurance contract with the second plaintiff (the insured) to cover the second plaintiff against various risks at a construction site where the second plaintiff was engaged as the building contractor. The site was at Lot PTD 25671,
B Jalan Sagu 36, Taman Daya, 81100 Johor Bahru ("the project site").

[5] The defendant was a security company that entered into a contract with the second plaintiff to provide security services at the project site ("the security services contract").

C **[6]** A theft of newly installed electrical cables and fibre optic cables occurred at the project site on or about 31 July 2017 – which was a risk covered by the said insurance contract. The second plaintiff/insured duly looked to the first plaintiff/insurer for compensation. The first plaintiff appointed adjusters to assess the claim and honoured the insurance policy by
D paying compensation of RM1,314,361.52 to the second plaintiff.

[7] The second plaintiff was asked to, and did sign a "discharge and subrogation form" dated 21 May 2018 to confirm:

(i) acceptance of the first plaintiff/insurer's offer to pay RM1,314,361.52 as full and final settlement of the second plaintiff/insured's claim under
E the insurance contract; and

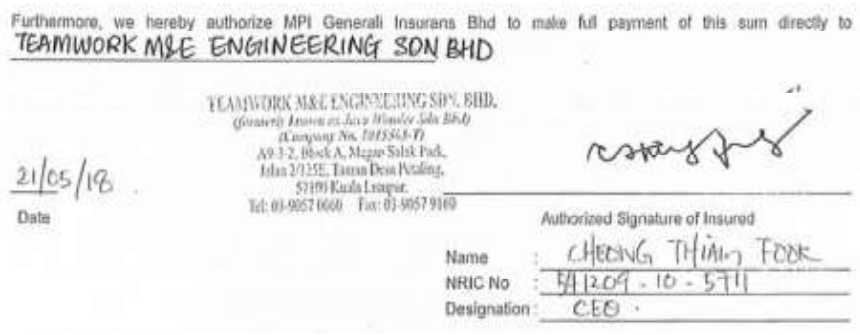
(ii) that the first plaintiff is subrogated with the second plaintiff's rights to recover from any party liable for the loss or damage (that gave rise to the insurance claim). The contents of the "discharge and subrogation
F form" (as exhibited in the first plaintiff's affidavit) are as follows:

DISCHARGE & SUBROGATION FORM

G To : MPI GENERALI INSURANS BERHAD Claim Ref : E8008735

I/We **CASA ANDAMAN SDN BHD AS PRINCIPAL, ATURAN PRISMA SDN BHD AS MAIN CONTRACTOR, TEAMWORK M&E ENGINEERING SDN BHD AS M&E MAIN CONTRACTOR AND ALL THEIR SUB CONTRACTORS F.T.R.R. &** I hereby accept your offer of Malaysian Ringgit ONE MILLION THREE HUNDRED AND FOURTEEN
H THOUSAND THREE HUNDRED AND SIXTY ONE AND CENTS FIFTY TWO (RM1,314,361.52) only in full and final settlement of my/our claim under policy no. E0047760 in respect of theft loss of contract work comprising of newly installed electrical cables and elv fibre optic cables occurring on or about 31/07/2017.

I/We **CASA ANDAMAN SDN BHD AS PRINCIPAL, ATURAN PRISMA SDN BHD AS MAIN CONTRACTOR, TEAMWORK M&E ENGINEERING SDN BHD AS M&E MAIN CONTRACTOR AND ALL THEIR SUB CONTRACTORS**
I **F.T.R.R. &** I hereby agree that in consideration of your settlement you become subrogated with all my/our rights and remedies to recover from any party liable for the loss or damage and you have my/our authority at your own cost to use my/our name to the extent necessary effectively exercise such rights and remedies and I/we will furnish you with any assistance that you may reasonable require from me/us it being understood and agreed that you will indemnify me/us against any liability costs expenses arising from such exercise.


Furthermore, we hereby authorize MPI Generali Insurans Bhd to make full payment of this sum directly to TEAMWORK M&E ENGINEERING SDN BHD

TEAMWORK M&E ENGINEERING SDN. BHD.
(formerly known as Jaya Wonder Sdn Bhd)
(Company No. 1015363-T)
A9-3-2, Block A, Megan Salak Park,
Jalan 2/125E, Taman Desa Petaling,
57100 Kuala Lumpur.
Tel: 03-9057 0660 Fax: 03-9057 9169

21/05/18
Date

Authorized Signature of Insured

Name : CHEONG THIAM FOOK
NRIC No : 541209-10-5711
Designation : CEO

The Plaintiffs' Pleaded Case

[8] As is evident from the intitulement of this civil suit and statement of claim, the insurer had named itself as the first plaintiff and the insured as the second plaintiff, to bring an action in tort against the defendant for breach of duty of care. In a statement of claim that pleaded the salient facts as narrated above, it was further pleaded that pursuant to the said "discharge and subrogation form", the first plaintiff was subrogated with all the second plaintiff's rights to recover from any party responsible for the loss or damage, as could be seen at para. 22:

> 22. Plaintif-Plaintif memplidkan bahawa Borang Pelepasan & Subrogasi tersebut secara ringkasnya menyatakan seperti berikut:
>
> a. Plaintif Kedua bersetuju bahawa Plaintif Pertama menjadi subrogasi dengan semua hak dan remedi milik Plaintif Kedua bagi menuntut terhadap sebarang pihak yang bertanggungjawab ke atas kerugian atau kerosakan tersebut; dan
>
> b. Plaintif Pertama memiliki kuasa bagi menggunakan nama Plaintif Kedua bagi melaksanakan hak-hak dan remedi-remedi secara efektif (effectively exercise such rights and remedies).

[9] It was further pleaded at para. 27 that the defendant owed the second plaintiff a duty of care, as follows:

> 27. Plaintif-Plaintif memplidkan bahawa pihak Defendan memiliki kewajipan berjaga-jaga (duty of care) terhadap Plaintif Kedua kerana Defendan telah dikehendaki bagi membekalkan kakitangan keselamatan agar menjaga keselamatan Tapak Projek tersebut sepanjang tempoh 24-jam.

[10] At para. 34, both plaintiffs pleaded that they suffered losses.

> 34. Pihak Plaintif-Plaintif mengalami kerugian berjumlah RM1.314,361.52 yang merupakan kos Kabel-Kabel yang Hilang tersebut serta RM36.299.17 sebagai bayaran kepada pihak Crawford, yang bertindak sebagai pelaras.

35. Plaintif-Plaintif menuntut daripada pihak Defendan relif-relif seperti berikut:

a. Ganti rugi berjumlah RM1,350.660.69.

The Defendant's Application & Submissions

[11] The defendant's application to strike out the first plaintiff's claim was made under O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012. The essence of the defendant's submissions is that the first plaintiff/insurer has no right to use its own name to sue the defendant. It was forcefully submitted that "if an insurer wishes to exercise its right of subrogation, the insurer must step into the shoes of the insured and sue in the name of the insured against a wrongdoer and not in its own name. The cause of action in such cases lies at all times with the insured. The insurer has no cause of action of its own against the wrongdoer."

[12] Learned counsel for the defendant relied on the decision of the Federal Court in *Teo Kim Kien & Ors v. Lai Sen & Anor* [1980] CLJU 80; [1980] 1 LNS 80; [1980] 2 MLJ 125 where it was held as follows:

> This case clearly is concerned with the doctrine of subrogation under which an insured must bring an action against the wrong-doer if he is called upon by his insurers to do so and is indemnified against the costs but it is his own cause of action, not that of his insurer that he sues on; as against the wrong-doer the insurer has no cause of action of his own: per Lord Diplock in *Hobbs v. Marlowe* [1978] AC 16 37 at page 37.

[13] In support of the defendant's application, learned counsel also cited the Court of Appeal's judgement in *Kementerian Pertahanan Malaysia & Anor v. Malaysian International Shipping Corporation Bhd & Ors* [2007] 4 CLJ 820; [2007] 5 MLJ 393 to reiterate the point that the insurer, even after subrogation, has no cause of action of its own, and that an action against a wrongdoer could only be brought in the name of the insured alone.

[14] The defendant's counsel also submitted that if an insurer wishes to use its own name to sue a wrongdoer, there must be an assignment of the insured's cause of action, from the insured to the insurer. The following passage was cited from *Principles of Insurance Law* (6th edn) by Poh Chu Chai, where the learned author had opined:

(a) The insurer can arrange for the Insured to bring an action against a third party responsible for causing the insured's loss; or

(b) The insurer can take an assignment of the insured's cause of action and bring an action against the third party in the insurer's own name. An insurer has no right to bring an action against an insured's tortfeasor in his own name without taking an assignment of the insured's cause of action.

The First Plaintiff's Stand

[15] In opposing the defendant's application, learned counsel for the first plaintiff cited several authorities, *inter alia*, the judgment of the Court of Appeal in *Tiong Nam Trading & Transport (Malaysia) Sdn Bhd v. Commercial Union Assurance (M) Sdn Bhd* [2008] 6 CLJ 160; [2008] 6 MLJ 342 where it was held:

> [33] The doctrine of subrogation confers two distinct rights on the insurer after payment of a loss. Firstly, the insurer is to receive the benefit of all rights and remedies of the insured against third parties which, if satisfied, will extinguish or diminish the ultimate loss sustained (*Castellain v. Preston & Ors* (1883) 11 QBD 380, CA; and *H Cousins & Co Ltd v. D & C Carriers Ltd* [1971] 2 QB 230, CA). Secondly, the insurer is thus entitled to exercise, in the name of the insured, whatever rights the insured possesses to seek compensation for the loss from third parties.

[16] An authority of more relevance to the plaintiff's stand was a recent judgment of the High Court in *Allianz General Insurance Company (Malaysia) Bhd & Anor v. Fuji Logistics (M) Sdn Bhd & Anor* [2021] CLJU 1913; [2021] 1 LNS 1913; [2021] MLJU 2270, wherein the facts closely resemble this present case. There, Allianz General Insurance Company (Malaysia) Bhd had named itself as the first plaintiff and the insured as the second plaintiff – just as what the first plaintiff in this case had done.

[17] Learned counsel for the first plaintiff had urged me to follow *Allianz General Insurance Company (Malaysia) Bhd & Anor v. Fuji Logistics (M) Sdn Bhd* (*supra*), wherein Amarjeet Singh J had dismissed the defendants' respective applications to strike out Allianz's claim against them. In other words, Amarjeet Singh J had ruled that an insurer may use its own name to sue the wrongdoer that is an unrelated third party.

Analysis Of The Facts And Law

[18] With respect, I beg to differ from the views of Amarjeet Singh J as expressed in *Allianz v. Fuji Logistics* (*supra*). I am of the view that a subrogation clause alone is insufficient to clothe an insurer with a right to use its own name to sue a party who breached a contract with the insured or who committed a tort that caused the insured to suffer a loss. My reasons for forming a different view shall be set out below after summarising the pertinent facts in this present case.

[19] First, as could be seen from the first plaintiff's plea as quoted in para. [10] above, besides the sum of RM1,314,361.52 that was paid by the first plaintiff to the second plaintiff to honour the insurance contract, there was an additional sum of RM36,299.17 claimed by the first plaintiff being adjusters' fees paid to Crawford. In other words, the first plaintiff was attempting to claim from the defendant more than what it had paid to settle

A the insurance claim made by the second plaintiff/insured. This is relevant because the first plaintiff must have its own cause of action to be entitled to do so.

[20] I noted that the first plaintiff/insurer had pleaded in the main prayer, at para. [35] of the statement of claim, as if it had a cause of action of its own
B against the defendant. Whilst the claim by the second plaintiff against the defendant was for "breach of duty of care" in tort, there was no mention as to how the defendant is to be held liable for the first plaintiff's loss of RM36,299.17 – whether the first plaintiff is alleging that the defendant also owed the first plaintiff/insurer a duty of care?

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[21] Secondly, there is no dispute that the second plaintiff, as the party that entered into the security services contract with the defendant, has the *locus standi* to commence a civil suit against the defendant. It is an undisputed fact that the second plaintiff did not assign its contractual rights and/or chose in action to the first plaintiff. Thus, the chose in action, *ie*, the right to sue the
D defendant, remains with the second plaintiff.

[22] The case of *Tiong Nam Trading & Transport (M) Sdn Bhd v. Commercial Union Assurance (M) Sdn Bhd* (*supra*) cited by learned counsel for the first plaintiff stated "in the name of the insured" as could be seen from the passage
E quoted below:

> Secondly, the insurer is thus entitled to exercise, **in the name of the insured,** whatever rights the insured possesses to seek compensation for the loss from third parties. (emphasis added)

[23] The judgment of the Federal Court that clearly defined the doctrine of
F subrogation is *Teo Kim Kien v. Lai Sen* (*supra*), which succinctly explained the doctrine of subrogation as follows:

> This case clearly is concerned with the doctrine of subrogation under which *an insured must bring an action against the wrong-doer if he is called upon by his insurers to do so and is indemnified against the costs but it is his own cause*
G *of action, not that of his insurer that he sues on; as against the wrong-doer the insurer has no cause of action of his own:* per Lord Diplock in *Hobbs v. Marlowe* [1978] AC 16 37 at page 37. (emphasis added)

[24] The legal principle, that an insurer merely stands in the shoes of the insured to receive whatever the insured is entitled to recover from third
H parties, was in fact reiterated by the Court of Appeal in *Kementerian Pertahanan Malaysia & Anor v. Malaysian International Shipping Corp Bhd* (*supra*), as could be seen below:

> [7] In determining the issues in this appeal we took into consideration the following principles. *'Subrogation' is concerned with the mutual rights and*
I *liabilities of parties to a contract of insurance.* Pursuant to a contract of insurance, *where an insurer indemnifies an assured for a loss, he is entitled to 'stand in the shoes' of the assured* and to receive the benefit of all of *the rights* and

remedies which the assured may have against third parties in respect of such loss (Insurance Law in Australia, Kenneth Sutton; *Castellain v. Preston* [1883] Vol IX QBD 380). (emphasis added)

[25] There appears to be no case law from the appellate courts in Malaysia which ruled that an insurer, by just relying on a subrogation clause, has a right to use its own name to sue the party who breached a contract with the insured or to sue a tortfeasor who caused the loss to the insured. This is most probably because, back to basics, a subrogation clause is nothing more than a contractual clause between two parties, *ie*, the insurer and the insured, that gives an insurer a right to compel the insured to sue the party who breached a contract with the insured or to sue a tortfeasor, as the case may be, and for the insurer to receive the damages recovered. A subrogation clause cannot override the doctrine of privity of contract because the insurer is a stranger to the contract made between the insured and the other party. In Latin, this rule is known as *jus quaesitum tertio*.

[26] There was nothing in the Insurance Act 1996 that clothed a subrogation clause with statutory force to override the doctrine of privity of contract. When the Financial Services Act 2013 repealed the Insurance Act 1996 in 2013, it too, did not introduce any provision to empower subrogation clauses to override the doctrine of privity of contract.

[27] The fact that the doctrine of privity of contract is very much alive in Malaysia, and is a part of our Contracts Act 1950, was expounded recently by our Court of Appeal in *Glomac Alliance Sdn Bhd v. Nordin Md Zain* [2023] 3 CLJ 485; [2023] 3 MLJ 393 and confirmed with the following passage:

[35] *The law of privity of contract is well settled.* The landmark case of *Kepong Prospecting Ltd & Ors v. Schmidt* [1968] 1 MLJ 170, the Privy Council in its judgment *affirms the doctrine of privity of contract in the Contracts Act 1950.* … Lord Wilberforce delivered the Privy Council's opinion, at p 174, as follows:

The real question which arises as to this agreement is whether it could be enforced by Schmidt who in his personal capacity was not a party to it in the first place there can, in their Lordships' view, be no doubt that if the agreement were governed by English Law, Schmidt would be unable to enforce it. Their Lordships need, on this point, do no more than state their agreement with the judgment of the Federal Court which correctly stated the law from well-known passages in the opinions of the House of Lords in *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd* [1915] AC 847 at p 853 and *Scruttons Ltd Midland Silicones Ltd* [2023] 3 MLJ 393 at 405 [1962] AC 446 at p 468. *But it was suggested that in this respect the law of Malaysia differed from the law of England in admitting the principle of jus quaesitum tertio.* Their Lordships are of opinion that the appellant company failed to make good this contention. Their Lordships were not referred to any statutory provision by virtue of which it could be said that the Malaysian law as to contracts differs in so important a respect from

English law. *It is true that s. 2(d) of the [CA] gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties,* and it was not possible to point to any other provision having this effect. *On the contrary paragraphs (a), (b), (c) and (e) [of s. 2 of the CA] support the English conception of a contract as an agreement on which only the parties to it can sue.* (emphasis added)

[28] In *Glomac Alliance Sdn Bhd v. Nordin Md Zain* (*supra*), Mariana Yahya JCA writing for the Court of Appeal went on to cite the Federal Court's judgment in *Suwiri Sdn Bhd v. Government Of The State Of Sabah* [2008] 1 CLJ 123; [2008] 1 MLJ 743 to emphasise that the doctrine of privity of contract is very much applicable in Malaysia. Her Ladyship held:

[37] The Federal Court in the case of *Suwiri Sdn Bhd v. Government of the State of Sabah* [2008] 1 MLJ 743 also held that:

> [10] *The doctrine of privity of contract is that as a general rule, a contract cannot confer rights or impose obligations on strangers to it, ie, persons who are not parties to it.*

[53] *The absence of a privity of contract* between both the plaintiff and the defendant under the Glomac agreement renders the originating summons a non-starter. *Not only the plaintiff has no cause of action against the defendant but also has no recourse against the defendant under the Glomac agreement.* Be that as it may, the learned judicial commissioner also did not consider whether the plaintiff had *locus standi* to commence legal proceedings *vide* the originating summons premised on the Glomac agreement.

(emphasis added)

[29] Now, if an insured has suffered a loss that was allegedly due to the negligence of a third party, and the insurer is to sue the third party by relying on a subrogation clause (as in this case), the issue of duty of care will arise. Would it be fair to hold that whoever deals with a party whom an insurer is insuring, owes the insurer a duty of care? In *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389, reference was made to the English case of *Caparo Industries Plc v. Dickman* [1990] 2 AC 605 – where it was held that, three questions are to be addressed in determining whether a defendant should owe the plaintiff a duty of care. The Federal Court in *Majlis Perbandaran Ampang Jaya* (*supra*) explained the *Caporo* test with the following words:

> *Under English law, the general duty of care test enunciated in Caparo Industries Plc v. Dickman [1990] 2 AC 605 is applicable to all negligence claims,* including claims for pure economic loss. *Pursuant to this test, three questions have to be addressed,* namely, whether the damage suffered by the plaintiff is reasonably foreseeable; whether there is a relationship of proximity between the plaintiff and defendant; and whether it is fair and reasonable that the defendant should owe the plaintiff a duty of care.
>
> (emphasis added)

[30] Two years after *Majlis Perbandaran Ampang Jaya* (*supra*) was decided, the Federal Court had to decide on the imposition of duty of care on a firm of property valuers. In *The Co-Operative Central Bank Ltd v. KGV & Associates Sdn Bhd* [2008] 2 CLJ 545; [2008] 2 MLJ 233, the Federal Court approved the use of the *Caparo* test and held that to impose a duty of care for all those who might choose to act on advice given by a professional would impose "an intolerable burden". The exact words of Alauddin FCJ (as he then was) are as follows:

> In our respectful view, the situation is akin to the professional referred to by Griffiths LJ in *Smith v. Eric Bush* who ought not on policy grounds to be held to owe a duty to persons unknown. At p 865 of the report His Lordship observed:
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> > *It would impose an intolerable burden upon those who give advice* in a professional or commercial contract *if they were to owe a duty not only to whom they give the advice but to any other person who might choose to act upon it.* (emphasis added)

[31] By applying the *Caparo* test, I formed the view that a party who enters into a contract with an insured party does not owe any duty of care to the other party's insurer, and if I may paraphrase those words in the passage from *The Co-Operative Central Bank Ltd v. KGV & Associates* (*supra*), it would "impose an intolerable burden" upon those who enter into contracts with an insured party if they were to be held to owe a duty of care to the other party's insurer. As highlighted in para. [20] above, the first plaintiff attempted to claim its own loss (the adjuster's fees) but did not even plead what cause of action that it (the insurer) allegedly had against the defendant. If the first plaintiff is to plead that the defendant owed the first plaintiff/insurer a duty of care, with respect, it is a plea that would be unsustainable in law.

An Absolute Assignment Is Necessary To Empower An Insurer To Sue In Its Own Name

[32] I am of the view that an absolute assignment is mandatory for an insurer to cross the hurdle of privity of contract if it wants to use its own name to sue a tortfeasor or a party who had breached a contract with the insured, as the case may be, because an absolute assignment has statutory force which a subrogation clause lacks.

[33] The statutory force to empower absolute assignments to override the doctrine of privity of contract is found in s. 4(3) Civil Law Act 1956. The part of s. 4(3) of our Civil Law Act 1956 relevant to this case is that which refers to "chose in action". Hamid Embong FCJ (as he then was) in *Damai Freight (M) Sdn Bhd v. Affin Bank Bhd* [2015] 4 CLJ 1; [2015] 4 MLJ 149 defined "chose in action" as used in s. 4(3) Civil Law Act as follows:

> **A 'chose in action'** is legally defined as a thing of which a person has not the present enjoyment, but **merely a right to recover it (if withheld) by action** (see *Mozley & Whiteley's Law Dictionar*y (10th Ed). Essentially, **it is a personal right to sue** *ie*, a right to enforce payment of a debt by legal proceedings or to sue for damages for contract. (emphasis added)

[34] *Damai Freight (M) Sdn Bhd v. Affin Bank Bhd* (*supra*) was followed very recently by the Federal Court in *Sabah Development Bank Bhd v. Petron Oil (M) Sdn Bhd* [2020] 4 CLJ 811; [2023] 3 MLJ 600 on the application of the said s. 4(3) Civil Law Act 1956. In a judgment written by Nallini Pathmanathan FCJ for the Federal Court, Her Ladyship held:

> [63] The effect of an absolute assignment has been considered in numerous cases. In *Damai Freight (M) Sdn Bhd v. Affin Bank Bhd* [2015] 4 MLJ 149; [2015] 4 CLJ 1 the Federal Court explained in full how s. 4(3) was to be construed, as well its effect and consequences.
>
> [64] The definition to be accorded to a **'chose in action'** as explained in *Mozley & Whiteley's Law Dictionary* (10th Ed) was utilised. It is defined as 'a thing of which a person has not the present enjoyment, but merely a right to recover it (if withheld) by action'. It is therefore clear that the monies which Swakaya was entitled to receive from SESB under the SESB contract for the supply of diesel oil amounts to **a 'chose in action'**. It is indeed something to which the bank, as assignee had no present right of enjoyment, but by reason of the assignment was entitled to a right to recover those monies by action. (emphasis added)

[35] Section 4(3) of the Civil Law Act 1956 states as follows:

> Any **absolute assignment, by writing,** under the hand of the assignor, not purporting to be by way of charge only, of any debt or **other legal chose in action,** of which **express notice in writing has been given to the** debtor, trustee or **other person from whom the assignor would have been entitled to** receive or **claim the** debt or **chose in action, shall be, and be deemed to have been, effectual in law,** subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, **to pass and transfer the legal right to the debt or chose in action, from the date of the notice,** and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.
>
> (emphasis added)

[36] If the words relevant to "chose in action" in an absolute assignment (as emboldened in para. [35] above) are extracted from the said s. 4(3) and applied in the context of an insured/assignor and an insurer/assignee, it would clearly mean that an absolute assignment in writing, under the hand of the assignor/insured, of any legal chose in action (the right to sue the wrongdoer) of which express notice in writing has been given to the other party (the wrongdoer) against whom the assignor/insured has a chose in

action, shall be deemed to have been effectual in law to pass and transfer the legal right to the chose in action to the assignee/insurer, and all legal and other remedies for the same from the date of the notice.

[37] The final part of s. 4(3) Civil Law 1956 is crystal-clear in Parliament's intention to give statutory force to an absolute assignment to override the doctrine of privity of contract, in that the assent of the other party (the party who breached the contract or a tortfeasor) giving rise to the chose in action (right to sue) is not required. All that is required is for notice of the deed of assignment to be given to that party, for the absolute assignment to be effectual in law to pass and transfer the legal right to the chose in action to the assignee (which would include an insurer that is an assignee under an absolute deed of assignment), from the date of the notice.

[38] When an absolute assignment is "effectual in law" (as worded in s. 4(3) Civil Law Act 1956), it works to create privity of contract between the assignee and the other party who contracted with the assignor. In essence, the assignor ceases to have the chose in action because he has transferred it to the assignee and is legally substituted with the assignee – who can then use its own name to sue the other party. However, it is important to note that s. 4(3) only makes absolute assignments of rights to collect debts and chose in action effectual in law without the concurrence of the debtor or the person against whom the assignor has a chose in action. It does not enable the assignment of liabilities without the concurrence of a creditor.

Conclusion

[39] The existence of a subrogation clause in a contract between an insured and his insurer does not magically override the doctrine of privity of contract because there is no statutory force behind a subrogation clause – which is just a contractual clause that does not involve the third party who is to be sued.

[40] Based on the authorities cited above, I hold the view that an absolute assignment of a chose in action, which is "effectual in law" by virtue of s. 4(3) Civil Law Act 1956, is mandatory to cross the hurdle of privity of contract if the first plaintiff/insurer wants to use its own name to sue the defendant because an absolute assignment has statutory force which a subrogation clause lacks. For the above reasons, I was constrained to decline to follow *Allianz General Insurance Company (Malaysia) Bhd & Anor v. Fuji Logistics (M) Sdn Bhd* (*supra*).

[41] An insurer must bring an action in the name of the insured if it is relying only on a subrogation clause in the insurance contract to claim from the tortfeasor or party who is allegedly in breach of contract with the insured.

[42] In conclusion, unless there is an absolute assignment of the insured's chose in action (with due notice given) that is "effectual in law" by virtue of s. 4(3) of the Civil Law Act, an insurer has no *locus standi* to appear in

A the civil suit as a plaintiff. Since the first plaintiff in this case was not an "absolute assignee" of the second plaintiff/insured's contractual rights and chose in action against the defendant, the first plaintiff should have used only the second plaintiff's name to sue the defendant. In the circumstances, the first plaintiff's action against the defendant in this civil suit was obviously
B unsustainable. The defendant's application to strike out the first plaintiff's action was therefore allowed with costs. As for the second plaintiff's claim against the defendant, it shall proceed to trial.

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